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Supreme Court of the United States

OCTOBER TERM, 1932. No. 48.

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
Petitioner,

against

PHILIP ELTING, Collector of Customs of the Port of New York,
Respondent.

PETITION FOR REHEARING.

HERBERT M. TIERNEY,
Attorney for Petitioner.

GASPARE M. CUSUMANO,
JOSEPH F. LULLY,
RICHARD L. SULLIVAN,
Of Counsel.

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Supreme Court of the United States

No. 48.—October Term, 1932.

Lloyd Sabaudo Societa Anonima Per Azioni, Petitioner, *against* Philip Elting, Collector of Customs of the Port of New York, Respondent.	On Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR REHEARING.

The Petitioner respectfully prays that the Court grant a rehearing in the above entitled case for a reconsideration of its opinion handed down therein on the 5th day of December, 1932, and as reasons therefor submits the following:

I.

In the proceedings before the Secretary of Labor on all of the fines involved herein the Petitioner submitted a statement in writing, varying somewhat in language, signed by a responsible representative, to the effect that it had employed competent medical examiners of long practice and experience who carefully examined each alien prior to embarkation, and that the condition certified was not detected by such examination (Opinion, p. 3).

The opinion herein has recognized that those written statements, although unverified, were evidence which must be considered by the Secretary of Labor, and has held that

if the Secretary failed to consider them he acted beyond his authority. On page 7 of the opinion it is said:

> "As the protests were not rejected by the Secretary, the facts they disclosed were properly before him and were evidence which, in an administrative proceeding, must be considered and acted upon by the administrative officer."

Later in the opinion, it was said:

> "If the Secretary failed to consider evidence before him, he exceeded his authority."

In referring to the protests other than that presented in the *Fusco* case, the opinion further said (p. 7):

> "But we cannot say, on the records before us, that the Secretary did not consider them, as such [evidence], for what they were worth, regarding the official medical certificates as conflicting evidence entitled to greater weight. No ground exists, therefore, for setting aside his determination in these cases. The only question is the weight of the evidence, as to which the Secretary's conclusion is final."

The foregoing conclusion plainly overlooks the fact that the Government has insisted from the outset that facts presented to the Secretary in unverified statements were not evidence, and, at the trial, produced affirmative proof that they were not treated as evidence by the officials who imposed the fines. Unless these facts are to be disregarded, the judgment below must be reversed as to all causes of action except the 13th and 15th.

The complaint contained allegations in each cause of action that the alien in question, before embarkation, was subjected to competent medical examinations which showed him to be free of any of the diseases or disabilities referred

to in the Statute, and that he was free of any such disease or disability, or if so afflicted the fact could not have been detected by means of a competent medical examination at the time of embarkation, and it was further alleged that *evidence of those facts was duly submitted to the Secretary of Labor* (see paragraphs 4 and 5 of the complaint, R., p. 2 and corresponding paragraphs in the other causes of action). *Those allegations were denied by the answer* (see third paragraph of answer, R. 22, and corresponding paragraphs relating to the other causes of action).

The Government contended that the petitioner had not submitted anything to the Secretary of Labor that could be treated as evidence, and at the trial, produced Browning, the man who wrote the decisions in this case, as a witness to establish this point. He was qualified as an expert on Departmental practice, and his testimony (R. 131-142) leaves no doubt on this point. He said, "No, they are not evidence" (R. 132). "That petition or plea is always reviewed in connection with the evidence that is submitted. * * * I take it as a plea or petition" (R. 136, 137).

This evidence was referred to in Petitioner's brief at pages 10-11 and page 39.

Inasmuch as this Court has held that the sole issue in this case is whether the Secretary considered, and acted fairly on the evidence submitted to him, the testimony of Captain Browning, which goes directly to that issue and was offered in support of an issue made in the pleadings, although it was eventually rejected by the Trial Court (R. 202), cannot be disregarded in determining whether the Secretary acted unfairly or under an erroneous impression of the law.

No discussion is necessary to establish the admissibility of Browning's testimony. *Tang Tun* v. *Edsell*, 223 U. S.

673, 680; cf. *Frank* v. *Mangnum*, 237 U. S. 309, 331. It is not in the same category with the additional evidence of the examinations of the aliens, which this Court has held to be inadmissible.

The ambiguity of the opinions imposing the fines, which was recognized in the opinion, is thus removed by Browning's testimony. Taking the two together, it is clear that the Department treated the evidence submitted by the Petitioner merely as a plea or petition. The decisions characterized this evidence as a "protest," thus distinguishing it from evidence, and usually concluded with language to the following effect:

> "In view of the official medical certificate, however, the Bureau finds itself unable to accord favorable consideration to this protest" (R. 214); or
>
> "In view of the official medical certificate, the fact that the alien was excluded and deported thereunder, and the lack of proof that the disability did not exist at the time of embarkation, it is felt that the penalty as provided in Section 9 should be imposed" (R., pp. 222, 223); or
>
> "In view of the official medical certificate, however, it is believed that the disease did exist prior to embarkation and that it could have been detected" (R., p. 252); or
>
> "In view of the official medical certificate, however, the Bureau finds itself unable to accord favorable consideration to this protest, and feels that the penalty as provided in Section 9 should be imposed" (R., p. 257).

A more striking illustration is found in the case of *Leonardo Perraei*, where there were two decisions, the first having been written before the protest was received. In that opinion the Department referred to the opinion of the

Public Health Surgeons, noted that no protest had been received, and then said, "In the Bureau's opinion, the condition mentioned above did exist, and might have been detected by means of a competent medical examination, at the time the alien embarked" (R., p. 296).

After receipt of the protest, which was dated two weeks before the foregoing decision, and had been delayed by the Commissioner of Immigration, another decision was written which makes no reference to the protest except to acknowledge its receipt, and then in effect it reiterates the decision previously made, in the following words (italics ours):

> "In this instance the Bureau and Department, after reviewing the evidence with care, *found* that the condition of the alien could have been detected at the time he was embarked, and his inadmissibility to the United States ascertained at that time" (R. 293).

The use of the past tense in the foregoing decision shows that the Department referred to its previous decision and that the evidence there referred to was the medical certificate only. All other decisions are expressed in the present tense.

Other decisions will be found in the record at pages 235, 245, 334, 367, 375.

These decisions were not decisions in the ordinary sense, but rather letters of instruction to the Commissioner at Ellis Island. The second "decision" in the *Perazzi* case amounted to nothing more than an acknowledgment of the receipt of the Commissioner's letter enclosing the protest and a statement that the case had already been decided on the basis of the medical certificate.

In view of Browning's testimony and the language of the Departmental decisions it cannot be doubted that those acting for the Secretary of Labor in imposing the fines either treated the facts presented by the Petitioner as no evidence or that they treated the certificates of the American doctors as conclusive. Either position falls under the condemnation of the opinion in this case, because this Court has held that such certificates are not conclusive (pp. 5-6). The Government has contended that the doctors' certificates were not treated as conclusive, but it has not only admitted, but has insisted and proved that the facts presented by the Petitioner in unverified form were not treated as evidence by the Department of Labor.

The stress which was placed upon the *Fusco* case in the Petitioner's brief and upon the argument probably resulted in a misconception by the Court of the true factual situation in the other causes of action. But the issue was clearly presented throughout the litigation and was decided in our favor by this Court, but because of the misconception of the factual situation, the principle stated by the Court was not carried to its logical conclusion and applied to other causes of action.

The Secretary exceeded his authority in imposing the fines without considering evidence which was properly before him. These remarks apply to all of the causes of action except the thirteenth and fifteenth, which involve the aliens Crimi and Nelli and turn upon considerations which have been otherwise dealt with in the opinion.

II.

The opinion in this case while not entering into an extended discussion of the Second Point made in our brief,

that a fundamental question is involved which requires a trial *de novo,* introduces a new light on the question which warrants its reconsideration.

The present opinion qualifies the decision in the *Stranahan* case only to the extent that it holds that the certificate of the examining doctors at Ellis Island is not conclusive. The *Stranahan* case held that the power of the Secretary to act is dependent upon a finding of fact that the steamship company failed to perform its statutory duty of examination before embarkation. That was made the jurisdictional question by the *Stranahan* decision, but with the implication that the question was resolved in favor of the jurisdiction of the Secretary by reason of the conclusive effect given to the certificate of the American doctors.

Inasmuch as the Court now holds that the certificate is not conclusive, the jurisdictional question of foreign detectability remains open and must be determined upon all the evidence submitted in a trial *de novo.*

The language of the *Stranahan* case to which we refer is as follows:

> "the *power* to impose the exaction which the statute confers on the Secretary is lodged in that officer *only* when it results from the official medical examination at the point of arrival not only that an alien is afflicted with one of the prohibited diseases, but that the stage of the malady as disclosed by the examination establishes that the alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered *had* the medical examination been then made by the vessel or its owners, as the statute requires."

and the *Stranahan* opinion further supports that conclusion by quoting from the Senate Committee on Immigration:

> "This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape *even a risk* of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by competent medical authority to be entirely cured."

Since foreign detectability is the fundamental or jurisdictional question as the *Stranahan* case holds, then the issue is one which is always open to judicial determination *de novo*. *Crowell* v. *Bensor*, 285 U. S. 22; *Ng. Fung Ho* v. *White*, 259 U. S. 276; *In re Fassett*, 142 U. S. 479; *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19; all of which are to the same effect as *Miller* v. *Horton*, 152 Mass. 540, which held that if an administrative officer condemns a horse on the ground that it is afflicted with a contagious disease a court may thereafter determine *de novo* whether the disease in fact existed.

In this case the issue was presented to the Secretary by written statements of fact which this court held to be competent evidence but which the Secretary ignored. But the proceedings before the Secretary are not particularly material in relation to the question as to whether or not he had fundamental jurisdiction.

On the trial before the district judge on the jurisdictional issue further proof was submitted in the form of depositions and oral testimony. We think it has been admitted by all the courts in this proceeding that the testimony so offered established that competent examinations abroad were had and that any court upon that evidence would hold as an issue of fact that the Secretary did not have jurisdic-

tion to impose the fine because there had been no neglect in the examination of these immigrants.

This doctrine that a jurisdictional issue is always triable *de novo* should not be ignored in this case for the especial reason that the *Stranahan* decision and the Senate Committee plainly represented to steamship companies that they could avoid "even the risk" of these penalties if they would observe the duty laid upon them by the statute of subjecting aliens to competent examinations before embarkation. That duty was performed. Proof of its performance has been offered, and since the proof goes to the very power of the Secretary to act it should be received and considered.

Conclusion.

For the foregoing reasons your Petitioner submits that upon a reconsideration of the opinion herein the judgment below should be reversed as to causes of action first, second, third, fourth, fifth, sixth, seventh, eighth, twelfth and fourteenth.

Respectfully submitted,

Delbert M. Tibbetts,
Attorney for Petitioner.

Gaspare M. Cusumano,
Joseph F. Luley,
Richard L. Sullivan,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

December 28, 1932.

Delbert M. Tibbetts
Attorney.